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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	:	
	:	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	:	**MM Docket No. 92-266**
	:	
Leased Commercial Access	:	**CS Docket 96-60**
	:	DOCKET FILE COPY ORIGINAL

OPPOSITION OF USA NETWORKS

USA Networks opposes the Commission's proposal to change the formula for the determination for maximum rates that cable operators may charge for channels they are required to dedicate for "commercial use" on a leased basis. We will show that implementation of the ratemaking formula the Commission has proposed will defeat the very purposes of the Cable Act of 1992 by forcing cable operators to replace programming services which cable subscribers value with services which are decidedly less favored by the public. We also will show that the proposed formula is not mandated by the terms of the statute and exacerbates constitutional concerns. Although we believe that the proposal should be discarded entirely, the Commission can lawfully and, at the very least, should take steps to assure that the legitimate interests of existing cable networks and subscribers are protected.

The Proposed Formula Will Defeat The Goal of Consumer Choice and Program Diversity

The maximum rate formula that the Commission has proposed will have devastating effects on emerging services like USA Networks' Sci-Fi channel. It will also absolutely stifle the launch of new programming services.

Any assessments of the effects that the rate formula the Commission has proposed must start from the fact that -- despite the Commission's commendable efforts -- channel capacity remains exceedingly scarce. The Notice of Proposed Rulemaking ("NPRM") recognizes the extraordinary difficulty that new cable networks experience in achieving penetration levels sufficient to make them economically viable: If the new formula were adopted, some existing services would be subjected to "bumping." NPRM at ¶99. It is certainly true that the Commission is without power to alter the statutory requirement that cable operators maintain a specified number of channels for "commercial use". However, it does not follow that the Commission must ignore the effects that its formula will have on consumer choice. The way in which the new formula works will serve to exacerbate the existing scarcity situation and defeat the Cable Act's fundamental objective of maximizing consumer choice.

There are two basic and insuperable defects inherent in the maximum rate formula which the Commission has proposed in this proceeding. First, the calculation that results from application of the formula produces a maximum permissible rate that, in the case of many cable systems, will be close to zero. The limitations which the Commission has imposed upon "opportunity costs" artificially limits the maximum permitted rate. This, in turn, virtually guarantees a reimposition of a freeze on the launch of new cable services. The proposed formula is at odds with the purposes underlying the 1994 changes to the Commission's so-called "going forward rules." The entire purpose of those rules was to provide cable operators with meaningful incentives to add new services to their program line ups; recognizing that rigid adherence to cost-of-service rate setting would not accomplish that goal, the Commission allowed value of service considerations to be taken into account in the rates charged to subscribers for new cable networks added to regulated tiers. See, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-286, 10 F.C.C.R. 1235 (1994) at ¶24. If the Commission now were to stimulate demand artifically for leased access by lowering the maximum reasonable rate, the gains the Commission has made in fostering the development of new cable networks would be wiped out. Non-leased access services, once again, would be frozen out of the market.

There is a further and no less serious problem with the Commission's proposed formula. The NPRM recognizes that, in order to maintain the highest possible maximum permitted rate, cable operators will be compelled to bump those cable networks which yield the highest advertising revenues to the cable operator and/or carry a very low per subscriber license fee, if any. NPRM at ¶76. Those are the characteristics of the newer emerging cable networks which were launched by many systems following the adoption of the going-forward rules.

This formula targets those very program services, despite their popularity with cable subscribers. Because these services were untried at the time of launch -- and because of the superimposition of cable subscriber rate regulation in September, 1993 -- their per subscriber fees were relatively modest. Indeed, in the case of some newer networks, no fee was charged to charter affiliates for a period of years. At the same time, many of these services are popular and, therefore, are attractive to local advertisers. The fashioning of a formula which, in the current environment, virtually assures that highly popular, low-cost services will be "bumped" is wholly antithetical to program diversity.

It also is necessary for the Commission to take account of the types of services that are likely to replace the cable networks targeted for bumping under the proposed formula. The *ex parte* statements leading up to the rulemaking suggests that two categories of programming providers will benefit from the lower maximum rates. The first category is LPTV stations which, evidently, view leased access as a means of extending their coverage beyond areas in which they have must carry rights. The second category of potential users is home shopping services which, apparently, view leased access as a means of competing with existing home shopping stations and networks.

This is not what Congress intended. The congressional delegation of authority to the Commission to determine the "maximum reasonable rate" was never intended to allow the Commission to price commercial leased access in a way which ignores consumer's interests and preferences. The number of channels which Congress required cable operators to reserve for potential "commercial use" is a maximum. The simple fact that the total number of channels available for leased access has not been fully utilized proves nothing. NPRM at ¶24. The Commission was not directed by Congress to stimulate demand for leased access at any cost. Rather, it was directed to set a rate which assured that there would be the "widest possible diversity of information sources . . . available to the public." 47 U.S.C. §532(a) (emphasis added). Today, there is no shortage of program services. There is a shortage of available channels. In this environment, the adoption of a formula, the sole purpose of which is to stimulate demand for leased access and which compels "bumping" of low cost, highly popular cable services is completely at odds with the goal underlying the Cable Act in general and Section 612 in particular.

The Proposed Formula is Not Mandated by the Statute

The formula that the Commission has proposed is not compelled, either implicitly or explicitly, by the terms of the statute. The fundamental difference between the existing rule and the proposed rule is that the former establishes a market-based rate, while the latter attempts, very crudely, to measure the average cost to the cable operator of making channels available that are required to be designated for leased access. The statute, however, does not insist that the "maximum reasonable rate" be cost-based. Indeed, the NPRM recognizes this, allowing time-of-day differences to be taken into account in computing rates for part-time leased access. NPRM at ¶45. The very phrase "maximum reasonable rate" itself suggests that, in all cases, market considerations should be a paramount determination of maximum rate. Cf. U.S. v. 564.54 Acres of Land, 441 U.S. 516, 518 (1979).

The program supplier market is robustly competitive. Cable networks compete vigorously with one another and with leased access programmers both for access and audience. In this situation, the implementation of a cost-based formula skews the competitive balance between two classes of cable programmers, those for whom access cost is determined by the marketplace and those for whom access cost is determined by an agency-determined formula that completely ignores marketplace considerations.

The Commission is not legally compelled to reach this result. There is no evidence that cable operators have "gamed" the existing rules -- which, however imperfect, do reflect market considerations -- to engage in anticompetitive conduct. It is more likely that certain leased access programmers seek to "game" the statute purely for their own competitive advantage. Although the Commission's discretion in the number of channels that must be made available for leased access is extremely limited, no such restrictions apply to the Commission's responsibility for assuring that the maximum rate charged by cable operators to leased access providers is "reasonable". The Commission should refrain from adopting a cost-based formula. It should intercede in the marketplace negotiations between leased access programmers and cable operators only in those cases in which the programmer is able to demonstrate that the cable operator seeks to use its fee structure for anticompetitive purposes.

At the Minimum, the Proposed Rules Must be Adjusted

At the very least, the Commission can and should adopt rules which protect the legitimate interests of emerging cable networks -- like Sci-Fi -- from bumping, and afford new services a fair opportunity to be launched.

As the Commission is well aware, it is critically important for all cable networks to be carried in the lowest possible tier. USA Networks has negotiated long and hard, and has made very significant concessions, to induce its cable affiliates to carry Sci-Fi. Having struck bargains with cable operators, we should not be exposed now to summary displacement by leased access programmers, such as LPTV stations and home shopping services. We, and others, who are investing substantial resources for the launch of new services, at the least, should have a reasonable opportunity to launch them.

Given the flexibility of the statute, there are several steps which the Commission can and should take. First, the statute plainly empowers the Commission to insist that cable operators exhaust all unused channel capacity before bumping takes place. Second, the statute permits the Commission to grandfather incumbent occupants of the basic and enhanced tier service.

Third, if it is not abandoned altogether, the formula can and should be adjusted to reflect the fact that there is economic value to carriage in the basic or enhanced basic tier. As the formula works now, the rate for carriage on a pay-per-view basis is higher than the rate for carriage in a tier. This is irrational. At the very minimum, the rules should require programmers seeking leased access carriage in a tier to pay a very substantial premium reflecting the special value associated with that form of service. Just as the Commission has recognized time-of-day pricing differentials, it should also recognize the economic difference to programmers between pay-per-view service and carriage on a tier. While this is far from a perfect solution to the threat posed by the new rule to the launch of new services, it will tend to equalize the competitive balance between leased access programmers and emerging and new cable networks.

The Proposed Formula Must be Changed to Avoid Constitutional Concerns

There is no question that Section 612 limits the exercise of editorial discretion by cable operators and, therefore, burdens speech. Unless it is modified, the formula which the Commission has advanced will intensify that burden because it effectively forces cable operators to choose between services which are highly valued by subscribers and those services that are unwilling to pay prevailing market rates for access to subscribers. Even if the statute itself passed muster under the O'Brien test, the formula as proposed fails the "substantial government interest" test. United States v. O'Brien, 391 U.S. 367, 377 (1968). Cf. Chicago Northwest & Transport Co. v. U.S., 678 F.2d 665, 668 (7th Cir. 1982). As proposed, the formula cannot be justified on grounds that it furthers a substantial governmental interest in program diversity; as we have shown, it does precisely the opposite. Nor can the formula be justified on general considerations of maintaining competition in the cable programming services marketplace; as we have also shown, it does not do this either. Least of all, can this formula be claimed to serve a substantial government interest in protecting over-the-air television: LPTV stations have must-carry rights. By manipulation of the maximum reasonable rate rule, the Commission would be granting preferred status to satellite-delivered home shopping services. There is no "substantial governmental interest" in that outcome.

The Commission is not the final arbiter of the constitutionality of Section 612. However, it has the responsibility to see to it that the maximum reasonable rate rule appropriately reflects First Amendment concerns. As proposed, the formula does not do so.

Conclusion

For these reasons, USA Networks urges the Commission not to adopt its proposal to change the formula for the determination of maximum rates that cable operators may charge for channels required to be dedicated for commercial use on a leased basis. Although we believe that the proposal should be discarded entirely, the Commission can and must, at the very minimum, adopt rules and modify the formula so that the legitimate interests of exiting cable networks and subscribers are protected and so that constitutional concerns are avoided.

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